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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

FELIX G. FOGG, STAFF SERGEANT, U.S. MARINE CORPS,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE SEIZURE OF UNMARKED VIDEOTAPES OBTAINED BY A POLICE OFFICER RUMMAGING THROUGH AN OPEN DUFFLE BAG DURING A SEARCH PURSUANT TO AN OVERLY-BROAD WARRANT WHICH SPECIFICALLY AUTHORIZED SEIZURE OF "PHOTOS" BUT WAS SILENT AS TO VIDEOTAPES OR VIDEOCAMERAS, VIOLATE THE FOURTH AMENDMENT, PARTICULARLY WHERE THERE WAS NO PROBABLE CAUSE PRESENTED TO THE MAGISTRATE TO SUPPORT A SEIZURE OF PHOTOS?

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OCTOBER TERM, 1999

FELIX G. FOGG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

The petitioner, Felix G. Fogg, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Armed Forces rendered in this case on September 30, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (Appendix A, *infra*) is reported at 52 M.J. 144. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Appendix B, *infra*) was unpublished.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals on September 30, 1999 (Appendix

A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was an active-duty enlisted Marine Corps non-commissioned officer. He resided off-base in North Carolina in a single-family dwelling. Petitioner sold illegal drugs to undercover law enforcement agents at off-base locations on several occasions. While preparing for another transaction, the agents became concerned that petitioner suspected that he had actually been dealing drugs to the police. A detective in the local sheriff's department prepared an application for a search warrant and an affidavit in support thereof. The face of the application incorporated the affidavit by reference. In turn, the warrant authorization incorporated the application.

The application for the warrant claimed probable cause to believe that "photos" would be among the items found at petitioner's residence. The application, which made no mention of videotapes or videocameras, failed to provide any specificity as to which photos were being sought.

Furthermore, the detective's affidavit in support of the warrant made no mention of photographs, videotapes, or videocameras, but did generally allege that drug dealers frequently possessed counter-surveillance equipment.

The warrant in question was issued by a North Carolina magistrate. During the search of petitioner's residence, marijuana was found in divers places throughout the house. In a bedroom, the detective who prepared and obtained the warrant saw an open bag with a video camcorder inside. He lifted the camcorder out of the bag, checked for a tape, turned the camcorder on, and viewed the tape through the viewfinder. He then played a second tape which he also found in the bag. This tape contained an image of a teenage girl who appeared intoxicated. Both tapes were unmarked. Both tapes were seized. The police used the tapes to identify, locate, and interview three young girls shown on the tape and to question petitioner's two sons.

Petitioner was tried by officer members at a general court-martial on 22 January, 8 March, and from 29 March to 4 April 1996. The defense filed a timely motion to suppress the videotapes, which was denied. The detective testified during the motion hearing that at the time he seized the videotapes, he did not believe that they constituted "photos" under the warrant. However, during the course of the trial, he came to believe that they did.

Pursuant to his pleas, petitioner was convicted of conspiracy to distribute cocaine (with a minor modification to the specification), three specifications of distribution of cocaine, and possession of marijuana with intent to distribute, in violation of Articles 81 and 112a, Uniform Code of Military Justice (hereafter "UCMJ"), 10 U.S.C. §§ 881 and 912a, respectively. Contrary to his pleas, petitioner was convicted of distributing marijuana and cocaine; rape; indecent assault; and committing indecent acts, in violation

of Articles 112a, 120, and 134, UCMJ, 10 U.S.C. §§ 912a, 920, and 934, respectively. He was sentenced to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted paygrade.

The Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence except for confinement in excess of 30 years. *United States v. Fogg*, No. 98-0910, slip op. (April 29, 1998).

The United States Court of Appeals for the Armed Forces also affirmed petitioner's case in a fractured decision. *United States v. Fogg*, 52 M.J. 144 (1999). The judge who authored the opinion believed that the search was legal alternatively (I) as a valid warranted seizure; (II) under the plain view doctrine; (III) pursuant to the good-faith exception; and (IV) under the independent source doctrine. One judge agreed that the tapes were admissible both as a valid warranted search and under alternative theories II and III but withheld judgment as to alternative theory IV. One judge concurred that the tapes were admissible as a valid warranted search but made no comment on the remaining theories. One judge concurred that the tapes were admissible as a valid warranted search and agreed with the dissenting opinion as to alternative theories II through IV. One judge dissented as to all four theories.

REASON FOR GRANTING THE PETITION

Petitioner's case provides good cause for review by this Court because it presents a significant constitutional issue: the legality of the seizure of an unmarked videotape during a search of an off-base residence when the warrant authorizing the search was not based on probable cause and failed the requirement for particularity in the listing of items to be seized, and where the detective executing the search

exceeded the scope of the warrant.

The Fourth Amendment mandates that no warrant shall issue except those "particularly describing" the items to be seized. The warrant relating to the search of petitioner's home contained no area in which to describe specific items to be seized. The application form for the warrant, however, did contain space to list the items to be seized; however, the list of items typed in did not include videotapes, or videocameras. Although the application for the warrant did list "photos," it did not state which photos were being sought. Moreover, in his affidavit in support of the application, the detective made no mention of photographs or photography cameras; rather, he simply alleged that illegal drug dealers often have counter-surveillance equipment.

A. That portion of the warrant authorizing seizure of "photos" was not based on probable cause.

The first fatal flaw in the warrant was the lack of probable cause to support the seizure of photographs; in fact, even the detective conceded at trial that there was no information in his affidavit from which a magistrate could have decided that "photos" were something to be seized. In order to issue a warrant, a magistrate is required to have probable cause to believe, under a totality of the circumstances, that the evidence sought by the police is located in the suspect's home. *Illinois v. Gates*, 462 U.S. 213 (1983). The affidavit supporting an application for a search warrant must provide a magistrate with a substantial basis for determining the existence of probable cause. *Id.* at 239. In petitioner's case, the Navy-Marine Corps Court of Criminal Appeals properly determined the absence of probable cause by noting the "complete absence of any facts presented to the magistrate to establish that `photos' constituted evidence of the appellant's home." *United States v. Fogg*, slip op. at 6. The Court of Appeals for the Armed

Forces failed to address this issue.

B. The warrant failed the requirement for particularity.

Even assuming that there was probable cause to seize photographs, the warrant on which the search of petitioner's residence was premised was nevertheless overly broad in that it failed to specify which photos were to be seized, thereby improperly leaving the law enforcement agents conducting the search to determine which photos to seize.

Both lower appellate courts failed to address the overbreadth issue in petitioner's case. The warrant and its supporting documents failed to set out any objective standard by which executing officials could differentiate photos which should be seized from those which should not have seized. The government was certainly fully capable of describing the photos sought in more particularity in view of available information as the detective prepared his application and affidavit; he even conceded during the motion hearing that he could have included in the application an averment that the law enforcement officers were searching for particular photographs that he could have described with more particularity.

Photographs generally are not inherently contraband items and are usually present in a person's residence in significant quantities, often in the hundreds. At the petitioner's motion hearing, the detective testified that he thought he had the discretion to seize what he felt was relevant and discard others, such as those of the petitioner in uniform. This level of discretion runs contrary to the cornerstone standard that a properly-drafted warrant must set out objective standards by which executing officers can differentiate items subject to seizure from those that are not. *United States v. Baker*, 888 F.Supp. 1521 (D.Haw. 1995).

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and **prevents the seizure of one thing under a warrant describing another.**

Marron v. United States, 257 U.S. 192 (1927) (emphasis added). Thus, the warrant in this case became a general warrant with regard to the seizure of photographs because it failed to state with particularity which photographs should have been seized.

> C. Even if the seizure of photos was proper, the seizure of videotapes exceeded the scope of the warrant because videotapes are not photographs.

Finally, even if the warrant was not overly broad as to the seizure of photographs, the inclusion of the word "photos" on the application list still did not encompass seizure of videotapes. While both photographs and videotapes record images, they are vastly different. Photographs are pictures or other images obtained by the chemical action of light or other radiation on specially sensitized material such as film or glass. *The New Shorter Oxford English Dictionary* 2193 (1993). A videotape is either a magnetic tape for use with a video recorder for recording broadcast television material or in a video camera, or a recording made on such tape. *Id.* at 3577. Although both record images, they are not interchangeable within their common meaning, as even the detective who seized the tapes acknowledged at trial. He admitted on cross-examination that common sense dictates that a photo is not a videotape and he twice admitted that at the time of the search, he did not believe that a videotape was photograph.

Descriptions in warrants and in their supporting documents are to be read in a common sense fashion, not hypertechnically. *United States v. Gendron*, 18 F.3d 955 (1st Cir. 1994). Moreover, there was nothing from the appearance of the videotapes to indicate that they were linked to criminal activity.

The Court of Appeals for the Armed Forces placed heavy emphasis on the 8th Circuit's ruling in *United States v. Lowe*, 50 F.3d 604 (8th Cir.), *cert. denied*, 516 U.S. 900 (1995), describing *Lowe* as a case similar to petitioner's. *United States v. Fogg*, 52 M.J. at 148. In *Lowe*, the Eighth Circuit upheld the seizure of a videotape which depicted Lowe standing with his co-conspirators, notwithstanding the fact that the warrant failed to list videotapes as an item sought for seizure. However, the warrant in *Lowe* contained authorization to seize "photographs and other items that tend to show co-defendants or co-conspirators" and "items of personal identification." The Eighth Circuit did not equate a videotape to a photograph, but rather held that the videotape fell within the warrant because it showed Lowe with other people and served as a means of personal identification, both of which were items sought under the warrant. The Court of Appeals for the Armed Forces failed to recognize the critical distinctions between the language of the Lowe warrant and the language of petitioner's warrant.

In sum, the sheriff's department seizure of unmarked videotapes removed from an open duffle bag and viewed through a videocamera amounted to nothing more than the type of "general, exploratory rummaging in a person's belongings" that this Court condemned over twenty-five years ago in *Coolidge v. New Hampshire*, 403 U.S. 433, 467 (1971). The Court of Appeals for the Armed Forces erred in finding that the seizure of the

videotapes could be upheld as a valid warranted search inasmuch as there was no probable cause to seize photographs, the warrant was overly broad, and the detective exceeded the scope of the warrant by seizing videotapes, which were not listed in the warrant application. Grant of this petition would permit the Court to address the particularity requirement as it applies to evolving technology, particularly those, such as videotapes, which impact on the average citizen.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States, Appellee

v.

Felix G. FOGG, Staff Sergeant
U.S. Marine Corps, Appellant

No. 98-0910

Crim. App. No. 96-1958

United States Court of Appeals for the Armed Forces

Argued March 3, 1999

Decided September 30, 1999

CRAWFORD, J., delivered the opinion of the Court in part. COX, C.J., concurred in part and in the result without opinion. SULLIVAN and EFFRON, JJ., filed opinions concurring in part and in the result. GIERKE, J., filed a dissenting opinion.

Counsel

For Appellant: *Mary T. Hall* (argued); *Major S.D. Chace*, USMC (on brief).

For Appellee: *Lieutenant Janice K. O'Grady*, JAGC, USNR (argued); *Colonel Kevin M. Sandkuhler*, USMC; *Commander Eugene E. Irwin*, JAGC, USN and Captain D.R. Fields, USMC (on brief).

Amicus Curiae Urging Reversal: *Berna M. Lee* (Law Student) (argued); *Steven H. Goldblatt* (on brief) - For Appellate Litigation Program, Georgetown University Law Center

Military Judge: Craig L. Carver

Opinion of the Court

Judge CRAWFORD delivered the opinion of the Court, in which COX, C.J., and SULLIVAN and EFFRON, JJ., joined in part.

Pursuant to his pleas, appellant was convicted of conspiracy to distribute cocaine;[1] distribution of cocaine (3 specifications); and possession of marijuana with intent to distribute, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 USC §§ 881 and 912a, respectively. Contrary to his pleas, he was convicted by officer members of distributing marijuana and cocaine; rape; indecent assault; and committing indecent acts, in violation of Articles 112a, 120, and 134, UCMJ, 10 USC §§ 912a, 920, and 934, respectively. The convening authority approved the sentence of a dishonorable discharge, confinement for life, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence except for confinement in excess of 30 years. We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO

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n1. Appellant pleaded guilty except for the words "Omar Fogg and." Prior to findings these words were stricken from the specification, and appellant then pleaded guilty to the specification as amended.

SUPPRESS VIDEOTAPES WHICH WERE VIEWED AND SEIZED DURING A SEARCH OF APPELLANT'S RESIDENCE, WHEN THE WARRANT FOR THE SEARCH, ITS APPLICATION, AND ACCOMPANYING AFFIDAVIT MADE NO MENTION OF VIDEO CAMERAS OR VIDEOTAPES.

We hold that seizure of the videotapes was reasonable for the reasons set forth below.[2]

FACTS

An informant identified appellant as trafficking in drugs, and he was targeted by the civilian police for controlled drug buys. The informant introduced appellant to an undercover police officer. Detective Sergeant Ralph Hines, who subsequently made three purchases of cocaine. A fourth buy was scheduled, at which the police intended to arrest appellant, but appellant failed to show up.

For the first buy, the informant paged appellant to set up the meeting in a Burger King parking lot and then used a pre-arranged signal to indicate to him that they were ready to buy drugs. The informant asked for $50 worth of crack cocaine, which appellant produced and she bought. Detective Hines said to appellant, "'Well, that looks pretty good,' and asked him if [he] could get another $50." Appellant hesitated, then walked away for about 5 minutes, and, when he returned, told Detective Hines that he only had $30 worth. Appellant told the detective to contact him "through the informant" for

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n2. This case was argued at Georgetown University Law Center, Washington, D.C., as part of the Court's "Project Outreach." *See* 38 MJ 136, 137 n.1 (CMA 1993).

future purchases because his phone was "rigged" to detect whether incoming calls were using recording devices.

The second buy, also at Burger King, was interrupted when appellant and his look-out, who was later identified as appellant's son, became suspicious because an unmarked police car drove by the parking lot. When the buy resumed, Detective Hines talked with appellant about appellant's "operational techniques." Appellant "pointed to the Burger King camera, [and] said that he had somebody in there monitoring that." The informant also told Detective Hines that appellant was taking pictures of those purchasing drugs from him so that he could "check them out." Detective Hones, the informant, and others described appellant as "high tech" and an "upper class" dealer who "kept records and a gun sometimes..."

By the time of the third buy, the police department had identified appellant as a Marine and was cooperating with the Naval Criminal Investigative Service, which assisted with surveillance, including videotaping the Burger King parking lot. Detective Hines testified that surveillance is sometimes used in drug enforcement work. In addition to the police using video and other surveillance equipment, it was command knowledge in the law enforcement community that drug dealers also often used such equipment.

While waiting at the Burger King for the third buy, appellant called Detective Hines and the informant at a pay phone and said that the police were in the area. As a result, appellant wanted to meet them elsewhere. As they pulled out of the parking lot, Detective Hines saw appellant's van and thought that appellant was probably engaged in surveillance of them. Detective Hines radioed his back-up "not to follow" them as that would tip off appellant to his true identity. Eventually, they met for the third buy and appellant quickly gave Detective Hines some cocaine. Testing appellant's

underworld acumen, the detective remarked that a car across the street belonged to the Jacksonville Police Department, when in fact it did not. Appellant replied, no, and then described in detail how he identified their unmarked cars.

At the third buy, appellant promised to trade "two blocks of crack cocaine for a pound of marijuana," in which Detective Hines had previously indicated he trafficked. Detective Hines was not wearing a body wire to record this conversation because he knew that appellant sometimes used an RF detector, which could detect a wire, and thought that he could be using it then. Appellant failed to show up for this fourth buy because the informant told appellant that Detective Hines was an undercover police officer.

Because appellant had been tipped off, the police thought it was important to move quickly to obtain a search warrant before he destroyed any evidence and the value of this operation was lost entirely. Detective Hines indicated that there were a number of items that they were looking for, such as counter-surveillance equipment, which were mentioned in his affidavit attached to the search-warrant application but not on the application itself. This difference was simply the product of their being "rushed." Detective Hines testified that counter-surveillance equipment includes "RF detectors, photos, cameras, binoculars, anything that can be used for surveillance, video."

The warrant authorized seizure of "crack cocaine, packaging and repackaging equipment, papers proving occupancy, records, weapons, pagers, RF detectors, photos, cellular phones [s], police scanners, scales/paraphernalia." During the search of appellant's bedroom, Detective Hines picked up a video camera and noticed a tape inserted in it. He decided to view the tape to see if he had been caught on film in appellant's surveillance operation.

Detective Hines also testified:

Q. When you were viewing these things, what gave you the authorization to search a cam corder? Is cam corder specifically listed on your search warrant?

A. No, sir.

Q. Why did you think you had authorization to search for a cam corder?

A. For the counter-surveillance equipment.
Q. Is there any other reason?

A. (No response.)

Q. Did the fact that photos was listed\----

A. Photos also, yes, sir.

Q. When you were looking at the cam corder, did you believe that that was something you had authority to look for?

A. Yes, sir.

Q. You stated that you took that first tape out. What did you do after that?

A. I put in the other tape.

Q. What were you going to do with that first tape?

A. Hold it for evidence.

Q. Why? What did you believe it was evidence of?

A. The marijuana growing in the --- see, I am looking through an eyepiece that's the size of a quarter. You can't really tell, but you can see something growing inside of it, and you can't tell what it is until you put in up on something bigger.

Q. At that point, you then determined that that was seizable?

A. Yes, sir.
Q. What happened with the second tape?

A. The second tape showed a scene with a girl in it.

Q. Did you believe that the second tape was evidence of some crime?

A. Yes, sir.

Q. Without elaborating greatly, describe why you believed it was evidence of a crime.

A. Contributing to the delinquency of a minor. It looked like she might have been a little intoxicated, and he is the only person there at the residence that I knew who was old enough to buy beer or liquor, and as I am rewinding that, it shows him setting up the camera.

Q. Him being the accused?

A. Yes, sir.

Q. What did you then elect to do with that tape?

> A. I just told them to seize the whole bag and we'll sort it all out, because it was at least contributing to the delinquency of a minor if nothing else.

On cross-examination, Detective Hines indicated that the tape had no outwardly "apparent evidentiary value." But he thought the videotape "could have been counter-surveillance tape footage of the buy occurring or something to that effect with me on it." He further admitted that a videotape was not a photograph. Detective Hines believed that this tape contained pictures of intoxicated young girls and a person believed by the officer to be one of appellant's sons engaged in sexual activities with them. According to the court below:

> Using the seized cassette, the police eventually identified, located, and interviewed three young girls (aged 13 to 15) shown on the tape. The police also questioned the appellant's two sons about the content of the seized videos. During the interviews with the girls and the sons, the police obtained the evidence used by the Government to convict the appellant of the contested offenses. That derivative evidence established that the appellant directed his sons to invite the girls to his house; provided alcohol or drugs to the girls so that they would become incapacitated; video taped two of the incapacitated girls being sexually compromised by one of the sons at his direction; and raped one of the incapacitated girls.

Unpub. op. at 4.

In a motion to suppress the search results, the defense argued that the search warrant was unconstitutionally vague and the officers exceeded the scope of the search warrant. The judge denied the motion by ruling that the word "photos" in the

warrant gave the police authority to seize and view the videotapes. He also found the officers acted in good faith.

While the Government argued at trial that the video-tapes might be part of "counter-surveillance equipment," this "factual proposition" was never "presented to the magistrate." Unpub. op. at 6. While the court below determined that photos do not include cassettes, it nevertheless applied the good-faith exception and found the tapes to be admissible. *Id.* at 6-7. The court indicated that the officers acted in good faith, that "[t]heir testimony, along with their reference to 'counter-surveillance equipment' in the affidavit demonstrates that they were concerned that the appellant had obtained the visual image of the undercover detective." *Id.* at 7. Because appellant might have recorded some of the controlled drug deals, the police wanted to ensure that the identity of the undercover officer was not compromised.

Appellant implies that the military judge erred when he found that appellant "told [Detective] Hines that he had a friend who worked in the Burger King and that the friend could direct the Burger King drive-up video camera to the parking lot to video any transactions and look for police," as well as "that the accused often took pictures of those who bought from him and passed them around to see if they were law enforcement agents." Appellant contends that two issues arise out of these erroneous findings of fact.

I. VALID WARRANTED SEIZURE

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

> be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This Amendment protects the right to privacy against unreasonable searches. Warrants must be based on probable cause and specifically describe the things to be seized and the place to be searched.

We hold that there was a valid, warranted seizure of the videotape because the video tapes were covered by the scope of the search warrant.

Officers in executing a search warrant are often required to exercise judgment as to the items or things to be seized. *Strauss v. Stynchcombe*, 165 S.E.2d 302, 303 (Ga. 1968). In exercising this judgment, the police are "not obliged to interpret [the warrant] narrowly." *Hessel v. O'Hearn*, 977 F.2d 299, 302 (7th Cir. 1992); *see also United States v. Stiver*, 9 F.3d 298 (3d Cir. 1993), *cert. denied*, 510 U.S. 1136, 114 S. Ct. 1115 (1994). While police officers are required to make realistic, commonsense determinations as to what constitutes evidence, this determination must be based on probable cause. The issue we address in this section is whether the videotapes could be seized within the scope of the search warrant.

We hold that the action of the police in seizing the videotapes fell within the scope of the search warrant, which authorized seizure of "photos." "Photos," as defined by both Mil.R.Evid. 1001 (2), Manual for Courts-Martial, United States (1995

edition),[3] and North Carolina Rule of Evidence 1001(2), include videotapes. While these rules are not controlling in this case, they are indicative of the plain meaning of the word. Additionally, case law supports this seizure.

In *United States v. Lowe*, 50 F.3d 604 (8th Cir.), *cert. denied*, 516 U.S. 900, 116 S. Ct. 260 (1995), a case similar to the one at bar, Lowe, a convicted felon, was indicted for distribution of cocaine. Police officials applied for a warrant to search Lowe's residence for various evidence, including "photographs" and other "[i]tems of personal identification" which would tend to show the identity of Lowe's co-conspirators. During the search, police came across a videotape. The videotape contained pictures of Lowe and his c-conspirators holding firearms. After viewing the tape, the prosecution also charged Lowe as a felon in possession of ammunition and firearms.

The videotape was the only incriminating evidence on the firearms-possession charge. The Eighth Circuit applied a standard of "practical accuracy" in reviewing the sufficiency of the warrant and recognized that "specificity ... hinges on the circumstances of each case." In upholding the trial court's admission of the videotape and concluding the warrant was constitutionally valid, the court determined that the videotape "depicted" Lowe; it was evidence of identification of Lowe and his co-conspirators; and the videotape did not exceed the scope of the search warrant even though it did not explicitly mention the word "videotape." The Eighth Circuit observed: "The failure of the warrant to anticipate the precise form in which pictorial identification of [the defendant] ... would appear is not fatal." *Id.* at 607.

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n3. All Manual provisions are cited to the version applicable at trial. The 1998 version is unchanged, unless otherwise indicated.

In analogous situations, courts have upheld seizure of audiotapes. In *United States v. Reyes*, 798 F.2d 380 (10th Cir. 1986), the court held that a warrant authorizing seizure of "drug trafficking records" included records contained on an audio cassette tape. In the age of modern technology and commercial availability of various forms of items, the warrant could not be expected to describe with exactitude the precise form the records would take." *Id.* at 382-83. Additionally, in *United States v. Peters*, 92 F.3d 768, 769, 770 (8th Cir. 1996), unmarked audio tapes found during a search were held to be within the scope of a search warrant authorizing the search and seizure of "any records or documents associated with cocaine distribution." *See also United States v. Lucas*, 932 F.2d 1210, 1215-16 (8th Cir. 1991) (answering machine tape was sufficiently described as "records" in search warrant), *cert. denied*, 502 U.S. 869 (1991); *United States v. Meriwether*, 917 F.2d 955, 958 (6th Cir. 1990) (warrant authorizing seizure of phone numbers sufficient to cover phone number seized from pager; court interpreted the warrant as authorizing seizure of numbers "in whatever form they may appear"); *United States v. Truglio*, 731 F.2d 1123, 1128 (4th Cir.) ("audio cassettes fit the description of 'records' within a practical margin of flexibility"), *cert. denied*, 469 U.S. 862 (1984), *overruled on other grounds* in *United States v. Burgos*, 94 F.3d 849, 861-62 (4th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997); *United States v. Gomez-Soto*, 723 F.2d 649, 655 (9th Cir.) (microcassette properly seized; failure of warrant to anticipate "precise container" in which evidence might be found was "not fatal"), *cert. denied*, 466 U.S. 977 (1984); *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979) (holding that if seized item is "reasonably related to the purposes of the search," it should not be suppressed). Therefore, we hold that the military judge properly ruled that the word "photos," which were covered by the warrant, included videotapes.

Although not necessary for our opinion and not part of our holding, there are, in my view, three alternative theories which support upholding the search in this case: (II) the plain-view doctrine; (III) the good-faith exception; and (IV) the independent-source doctrine.[4]

(II) Plain View

The "plain-view doctrine" allows law enforcement officials conducting a lawful search to seize items in plain view if: 1) they are acting within the scope of their authority, and 2) they have probable cause to believe the item is contraband or evidence of a crime. *See* Mil. R. Evid. 316(d) (4) (C), Manual, *supra*; *see also United States v. Wisniewski*, 21 MJ 370 (CMA 1986) (holding that sergeant peering into window of appellant's barracks room did not violate legitimate expectation of privacy because sergeant made plain-view observation from common walkway where any passerby could have made the same observation), *cert. denied*, 476 U.S. 1160 (1986); *United States v. Bonfiglio*, 713 F.2d 932 (2d Cir. 1983); *United States v. Whitten*, 706 F.2d 1000 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *but see United States v. Kaliski*, 37 MJ 105, 108 (CMA 1993) (law enforcement officers were not lawfully present on patio at the time of observation so search was unlawful).

"The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Payton v. New York*, 445 U.S. 573, 587 (1980); *see*

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n4. Chief Judge Cox agrees with alternative theories II and III, and reserves judgment as to alternative theory IV. Judges Sullivan and Effron do not agree with any of the alternative theories.

also Texas v. Brown, 460 U.S. 730, 741-42 (1983) (plurality opinion). Detective Hines was lawfully present at the time of the seizure. The issue is whether Detective Hines had reasonable grounds to believe the videotape probably constituted evidence of a crime. We hold that he did. The detective knew generally that drug dealers will keep records and note by various means who was present at their sales transactions in order to protect themselves and to obtain payment. *Cf. United States v. Reyes*, *supra*. In addition, these detectives had specific information that this dealer used video and other "high-tech" equipment to record his drug transactions and keep tabs on his buyers.

Obviously, appellant's statement to Detective Hines that he "had somebody in there monitoring" while pointing to a camera, implies that the person and appellant were associates or that, at least, appellant wanted Detective Hines to believe they were associates. The military judge's finding that appellant's "friend" monitored the drug transfer by video was accurate. Whether appellant could actually access the monitoring equipment of record activities in the parking lot for his own use is not the issue. The issue is what Detective Hines believed based on what the informant and appellant told him during these controlled drug transactions. The military judge's finding of fact is based on Detective Hines' reasonable beliefs about appellant's illicit activities at the time the detective applied for and executed the warrant. His finding that appellant told the detective that his "friend could direct the Burger King drive-up video camera to the parking lot to video any transactions and look for police" is supported by Detective Hines' testimony. Further, neither appellant nor any other witness testify that appellant did not have a "friend" monitoring the video camera in the Burger King or that he could not video transactions and look for police. Therefore, absent any evidence to the contrary, we conclude that the military judge's finding of fact on this issue is fully supported by the record.

Appellant claims that this was error because Detective Hines subsequently testified that the informant had told him that appellant would want to see a picture identification of him to check him out for the sale. Further, the detective testified that he had not personally seen any counter-surveillance equipment. Appellant contends that, thus, "there was insufficient reason to believe" that there would be photos and counter-surveillance equipment in appellant's home. Final Brief at 8. Though the detective scrupulously avoided ever handing his photograph to appellant, to suggest that this is the only method that appellant could have had for obtaining some record of Detective Hines' identity is to ignore the balance of the detective's testimony. Appellant's own statements to the detective about his use of sophisticated recording devices and a video monitor at the Burger King drive-through dictate against such a conclusion.

At the very least, the statements were smoke-and-mirrors used by a drug dealer to leave his buyer with the distinct impression that he was being watched and could be later identified for some nefarious purpose should he forget his place in this power relationship. Additionally, the conduct and behavior which Detective Hines observed -- appellant's son surreptitiously warning appellant of a nearby unmarked police car; appellant's last minute change in the location of the third buy because of suspected police surveillance; the positioning of appellant's van as if to watch the detective when appellant changed that location; and appellant's acute skill in identifying unmarked police vehicles -- all support Detective Hines' belief that appellant's statements were accurate and truthful. This is above and beyond the general knowledge the detective already had from years of experience in drug enforcement and undercover work.

Thus, even if the videotapes were not within the scope of the warrant, they were properly seized by virtue of the plain-view doctrine.

(III) Good-Faith Exception

An alternative ground for upholding the search is the good-faith exception. Mil.R.Evid. 311(b) (3); *see also United States v. Chapple*, 36 MJ 410 (CMA 1993); *United States v. Lopez*, 35 MJ 35 (CMA 1992).

In *United States v. Leon*, 468 U.S. 897 (1984), the Court applied the good-faith exception to a facially valid search warrant. The "marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922. This exception will not apply if the officers do not "have a reasonable knowledge of what the law prohibits." *Id.* at 920 n.20. Nor will it apply to "bare bones" affidavits; there must be some meat into which the magistrate authorizing the search can sink his teeth. *Id.* at 915; *Lopez, supra* at 42. Nor will the good-faith exception apply if the information in the affidavit is false or provided recklessly. 468 U.S. at 914; 35 MJ at 41. This exception also would not apply when the officers' search is not reasonably limited to "only those places and for those objects that it was reasonable to believe were covered by the warrant." 468 U.S. at 918 n.19.

None of these exceptions to the good-faith doctrine are implicated by the facts of this case. Detective Hines did not specifically include videotapes in his affidavit because he and the other officers believed that evidence might be destroyed and so they rushed. In effect, by seeking the warrant he was protecting appellant's rights. There were good grounds for the police to believe that because appellant was tipped off by the informant, the evidence might be destroyed and a

warrantless search based on exigent circumstances could have been made. The police should not be penalized for seeking a warrant, however hastily.

Furthermore, the exclusionary rule, suppressing evidence from unreasonable searches and seizures, is not a constitutional right but "a judicially created remedy designed to safeguard Fourth Amendment rights...." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Certainly the search in this case was such that a thoughtful and competent judge signed the warrant. As in *Leon*, the extreme sanction of the exclusionary rule would be inappropriate. The officers were not trying to ignore or subvert the Fourth Amendment; in fact, they were protecting the right to privacy by obtaining a search warrant, rather than making a warrantless entry. A dispute as to what the word "photos" means is not sufficient to justify invoking the exclusionary rule in light of the case law cited above regarding the scope of the search, the good-faith exception, and the plain-view doctrine. By seeking a warrant, the police interjected into unexpectedly disordered circumstances an orderly procedure by a neutral and detached magistrate who determined what action could be taken.

(IV) Independent Source Doctrine

Assuming for the sake of argument that the foregoing was not applicable to the videotapes seized and appellant had prevailed in his challenge, the evidence of the sexual offenses derived from the tapes would still be admissible. The independent-source doctrine may be applied when the evidence is actually obtained through the independent and voluntary acts of third parties. *See United States v. Ceccolini*, 435 U.S. 268 (1978); *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) ("[T]he more apt question ... is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means

sufficiently distinguishable to be purged of the primary taint.'" (Citation omitted). Certainly, there is an independent source in the testimony of the victims which, in this case, was the product of their voluntary acts. Once questioned, all of the victims were willing to come forward as cooperative witnesses.

In *United States v. Karathanos*, 531 F.2d 26, 36 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976), "[t]he purpose of the search, as described in the application for the warrant, was to seize the illegal aliens; it is these same aliens who are not the government's prospective witnesses." Thus, the court considered their testimony to be far from voluntary. Here, however, there is testimony of the victims which the Government seeks to use at trial. 531 F.2d at 35. The officers neither employed any influence nor made use of the power of their position to coerce these scared and embarrassed young women to testify about the acts perpetrated upon them, making them witnesses of a very different type from the illegal immigrants in *Karathanos*.

CONCLUSION

The police search and seizure of the videotapes was proper. The police had a reasonable basis for believing that the videotapes might contain pictures of criminal activities. Furthermore, the police had a reasonable belief that the videotapes might contain pictures which could expose the undercover officer's true identity. Finally, it is reasonable for the police to have believed that the scope of the warrant, which authorized seizure of photos, encompassed all forms of photos, including videotapes. It is the reasonable beliefs in the minds of the officers executing the search that frames our inquiry, not the words in the affidavit attached to the application.

Furthermore, under any of the alternative theories presented in this opinion -- the plain-view doctrine, the good-faith exception, and the independent-source doctrine -- the evidence would be admissible. The exclusionary rule should not be applied to exclude relevant and reliable evidence. To rule otherwise would be to impose too high a cost on society.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

CONCURBY:
EFFRON (In Part); SULLIVAN (In Part)

CONCUR:

EFFRON, Judge (concurring in part and in the result):

I concur in Part I of the majority decision. I agree with Judge Gierke's dissent with respect to Parts II-IV.

SULLIVAN, Judge (concurring in part and in the result):

I would affirm this case on the basis that the challenged videotape evidence was seized during a lawful search conducted pursuant to and within the scope of a valid warrant. *See United States v. Lowe*, 50 F.3d 604, 607 (8th Cir.), *cert. denied*, 516 U.S. 900, 116 S.Ct. 260 (1995).

DISSENTBY:
GIERKE

GIERKE, Judge (dissenting):

I disagree with the majority's holding that the videotapes were included within the scope of the warrant. The court below held that videotapes were not within the scope of the warrant. Unpub. op. at 6. The agent who executed the

warrant did not believe that the term "photos" included videotapes. The case cited by the majority, *United States v. Lowe*, 50 F.3d 604 (8th Cir. 1995), does not, in my view, support the position that the terms "photos" includes videotapes. In *Lowe* the warrant authorized seizure of items "of personal identification," and the videotapes that were seized were labeled with the defendant's "street name." *Id.* at 607. *Lowe* stands for the proposition that videotapes labeled with the defendant's name were items of "personal identification"; it does not support the proposition that videotapes are "photos."

A warrant must specifically list the items to be seized. *Lo-Ji Sales v. New York*, 442 U.S. 319, 325 (1979). "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). In this case, the videotapes were not within the scope of the warrant. The decision to seize and view appellant's videotapes was the product of discretion exercised by the same NCIS agent who had testified that he did not think that videotapes were within the scope of the warrant.

In *United States v. Melendez*, 1990 WL 109201 at 4 (E.D.N.Y. July 20, 1990), a federal district court held that photos seized under a warrant that authorized seizure of videotapes were illegally seized, because they were not within the scope of the warrant. In *People v. Burke*, 690 NYS 2d 897 (N.Y.Sup.Ct. 1999), a New York trial court held that a warrant for "photographs of the complaining witnesses as well as other children, as well as diaries, journals, computer disks, NAMBLA [North American Man-Boy Love Association] literature, child-related paraphernalia, photographic equipment, receipts from photo developing stores, and photo albums," *id.* at 905, did not authorize seizure of "apparently unmarked" videotapes "strewn about

the apartment" and not stored with identifiable pornographic materials that were lawfully seized. *Id.* at 906, 905.

Similarly, in *Commonwealth v. Friedman*, 602 A.2d 371, 378, 380 (1992), the Superior Court of Pennsylvania held that videotapes were not within the scope of a warrant authorizing seizure of photos and sketches. While the Pennsylvania Constitution has a more stringent requirement for particularity in a warrant than the United States Constitution, *Friedman* is persuasive authority for the proposition that the word "photos" does not include videotapes. *Friedman* relies on the distinction between "visual information" such as "photos and sketches," where the evidentiary value is immediately apparent, and items such as movie film and videotapes that require a second intrusion into the owner's privacy in order to determine if they have evidentiary value. This same distinction was made by the Supreme Court in *Walter v. United States*, 447 U.S. 649, 654-57 (1980) (opinion of Stevens, J.).

I also disagree with the lead opinion's conclusion that the search can be upheld under the good-faith exception, plain-view, or the independent-source doctrine. The good-faith exception applies only when the police rely on the terms of the warrant. *See United States v. Leon*, 468 U.S. 897, 922-23 (1984) (good-faith exception requires reliance on a warrant that is objectively reasonable); *cf. Massachusetts v. Sheppard*, 468 U.S. 981, 988, 989-91 (1984) (good-faith exception applied where officers searched for items not in fact authorized by warrant after being assured by magistrate that the warrant was sufficient to cover items sought). I find it hard to say there was good-faith reliance on the warrant when the agent who executed the warrant did not believe that "photos" included videotapes.

I likewise disagree with the lead opinion's conclusion that the videotapes were lawfully seized because they were in plain

view. The NCIS agents were investigating a drug case. There was nothing on or around the tapes that identified them as evidence of a crime. *See Walter*, 447 U.S. at 653, 659-60 (opinion of Stevens, J.) ("plain-view" rejected where contents of films "could not be determined by mere inspection" without use of a projector); *see also Burke*, 690 NYS 2d at 906 (plain view doctrine not applied where videotapes were unmarked and not stored with other pornographic materials); *DePugh v. Penning*, 888 F. Supp. 959, 997 (N.D. Ia. 1995) (plain view rejected where photo, film, cassettes, and address book were not "of an obvious incriminating character"); *Ross v. State*, 59 Md. App. 251, 475 A.2d 481, 486-87 (1984) (plain view rejected where videotapes had no markings or labels indicating pornographic content).

I also disagree with the notion that the independent-source doctrine applies to this case. Appellant was not suspected of pornography or any sexual crimes. There is no evidence suggesting that the girls would have been identified and located or that they would have voluntarily come forward if the videotapes had not been seized.

In my view, there was no legal justification for seizing and viewing the videotapes. Accordingly, I dissent.

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

WILLIAM J. LUCAS JOHN T. OLIVER R. B. LEO

UNITED STATES

v.

Felix G. FOGG, 246 92 2514
Staff Sergeant (E-6), U.S. Marine Corps

NMCM 96 01958 Decided 29 April 1998

Sentence adjudged 4 April 1996. Military Judge: C.L. Carver. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

MARY T. HALL, Civilian Defense Counsel
Maj STEPHEN D. CHACE, USMC, Appellate Defense Counsel
LT JANICE O'GRADY, JAGC, USNR, Appellate Government Counsel

LUCAS, Senior Judge:

We have examined the record of trial, the assignments of error, and the Government's response thereto. We

conclude that the guilty findings are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. However, we also conclude that the approved sentence is inappropriately severe. *See* Art. 59 (a) and 66 (c), Uniform Code of Military Justice, 10 U.S.C. §§ 859 (a) and 866 (c) (1994) [hereinafter UCMJ]. *See also Assignment of Error III.* We will correct the sentence appropriateness problem in our decretal paragraph by affirming what we believe to be an appropriate sentence and thereby moot Assignment of Error III.

The appellant entered mixed pleas at his general court-martial. There was no pretrial agreement. Consistent with the appellant's guilty pleas, and following a completely satisfactory providence inquiry, the military judge entered guilty findings for several very serious drug offenses. *See* Art. 39, UCMJ, 10 U.S.C. §839; RULE FOR COURTS-MARTIAL 910 (g), MANUAL FOR COURTS-MARTIAL, UNITED STATED (1995 ed.). The appellant elected to be tried on the contested offenses by officer members. Contrary to his pleas, the members found the appellant guilty of rape, indecent acts, indecent assault, and another serious drug offenses. The convening authority approved the members' adjudged sentence, which consisted of a reduction of pay grade E-1, dishonorable discharge, and confinement for life.

In Assignment of Error II, the appellant contends that the contested guilty finding for rape is incorrect in law and fact. We disagree.

This court may affirm only such findings of guilty as it finds correct in law and fact. Art. 66 (c), UCMJ, 10 U.S.C. § 866 (c). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, a rational factfinder, the members in this case, could have found all the essential elements of the rape offense beyond a reasonable doubt. *United States v. Turner*,

25 M.J. 324, 324 (C.M.A. 1987). When applying this test, we are bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). We conclude that the evidence is legally sufficient to support the guilty finding for the rape offense.

The test for factual sufficiency is whether, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt of the rape offense beyond a reasonable doubt. *Turner*, 25 M.J. at 325. We are so convinced.

We will summarize the pertinent facts before resolving Assignment of Error I, which deals with the execution of a civilian search warrant.

The appellant, who lived off-base, first came to the attention of the police when a woman informant, who had previously provided reliable drug trafficking information, told an undercover police officer that the appellant was selling crack cocaine. The undercover officer directed the informant to conduct an uncontrolled cocaine purchase from the appellant to confirm that there was substance to her tip.

Based upon the uncontrolled purchase and the informant's history of providing reliable information to them, the police targeted the appellant. They set up a series of controlled drug purchases from the appellant. The undercover officer made his first purchase from the appellant when he was introduced by the informant. The undercover officer subsequently made more controlled purchases, dealing directly with the appellant. On each of those occasions, the appellant sold crack cocaine to the undercover officer. When the appellant's military status was discovered

by police, agents of the Naval Criminal Investigative Service (NCIS) were brought in as team members.

Police surveillance during the controlled buys confirmed the appellant's claim made to the undercover officer that at least one of his sons acted as a lookout for him during the drug deals and the likelihood that the appellant stored contraband drugs in his home. During the controlled transactions, the appellant told the undercover officer that he had someone inside a fast food restaurant monitoring a real-time video display of their activity (they were in the restaurant parking lot). The woman informant told officers that the appellant circulated pictures of his buyers to other drug dealers to identify undercover police officers. The appellant also told the undercover officer that he used electronic equipment to detect police taps of his home phone line and to detect police body-wires on prospective buyers. All this information led police to conclude that the appellant engaged in fairly sophisticated counter-surveillance activities designed to detect police activity directed to him.

After the third controlled transaction, the appellant agreed to provide the undercover officer with a larger amount of crack cocaine in exchange for an equivalent amount of marijuana. The police intended this exchange to be a "buy-bust" operation, during which they would arrest the appellant. However, the appellant never showed-up for this last transaction. The undercover officer promptly contacted the appellant by phone and, based upon that conversation, concluded that the appellant had discovered his police-officer status.

Concerned that the appellant would rapidly destroy evidence of his drug activity or remove it from his house, the police team rushed to draft a request for a state magistrate's warrant to search the appellant's residence for evidence of illegal drug activity. The warrant was obtained and then

executed at the appellant's home within a few hours after the "buy-bust" failed to materialize.

During the search, the undercover officer saw a video camera in plain view in the appellant's bedroom with an unmarked cassette inserted. He played-back that cassette and saw nothing of interest. He also played-back one other unmarked cassette to determine if it contained evidence of the appellant's illegal drug activity or whether it contained footage of him or any other police officer. He was concerned for his personal safety and that of other undercover officers if their pictures had already been circulated by the appellant to other drug dealers, as the informant had suggested was the appellant's practice.

Although the cassettes viewed by the undercover officer did not contain footage of the drug transactions or any pictures of police officers, one did contain footage of sexual activity between very young girls and a person believed by the officer to be one of the appellant's sons. The officer seized that cassette as evidence of the son's possible criminal sexual activity with the girls. All seized property belonged to the appellant and was seized in the appellant's home.

Using the seized cassette, the police eventually identified, located, and interviewed three young girls (aged 13 to 15) shown on the tape. The police also questioned the appellant's two sons about the content of the seized videos. During the interviews with the girls and the sons, the police obtained the evidence used by the Government to convict the appellant of the contested offenses. That derivative evidence established that the appellant directed his sons to invite the girls to his house; incapacitated; video tape two of the incapacitated girls being sexually compromised by one of the sons at his direction; and raped one of the incapacitated girls.

At trial the appellant's motion to suppress the video tape and all evidence derived from that seized tape was denied. The appellant argues that the military judge erred in denying that suppression motion. Although we agree with the appellant that the warrant did not authorize seizure of video cameras or video tapes, we conclude that the disputed evidence, including all derivative evidence, was properly admitted against the appellant.

Although this was originally a civilian police action directed against the appellant, the United States exercised prosecutorial jurisdiction because of the appellant's military status and the parties agree that the Military Rule of Evidence apply fully in this case. Those Military Rules of Evidence essentially codify and implement Fourth Amendment protection against unreasonable (unlawful) searches and seizures. *United States v. Hester*, 47 M.J. 461, 463 (1998).

Police authorities searched the appellant's home and seized his property pursuant to a state warrant issued by a magistrate. In order to issue the warrant, the magistrate was required to have probable cause to believe that the evidence sought by the police was located in the appellant's home. *See* MIL. R. EVID. 315(f) (1); *Illinois v. Gates*, 462 U.S. 213 (1983) (expressly adopted by the military courts in *United States v. Tipton*, 16 M.J. 283 (C.M.A. 1983)). Military Rule of Evidence 315 (f) (2) provides in pertinent part that "[p]robable cause to search exists when there is a reasonable belief that the ... property or evidence sought is located in the place ... to be search[ed]." A magistrate issuing a search warrant bases his or her determination of probable cause on the totality of the circumstances. *Gates*, 462 U.S. at 230. The affidavit supporting an application for a search warrant must provide the magistrate with a substantial basis for determining the existence of probable cause. *Id.* at 239; *United States v. Figueroa*, 35 M.J. 54, 55-56 (C.M.A. 1992). A magistrate's "determination of probable cause should be

paid great deference by reviewing courts." *Gates*, 462 U.S. at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). This standard of review recognizes that affidavits supporting search warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation" and are based upon "nontechnical, common sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings." *Gates*, 462 U.S. at 235-36 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).

In the appellant's case, the search warrant expressly indicates that the magistrate found probable cause to believe that the items specifically listed in the warrant application were located in the appellant's residence. Those listed items were "crack cocaine, packing and repackaging equipment, papers proving occupancy, records, weapons, pagers, RF detectors, photos, cellular phone, police scanners, scales/paraphernalia." (Emphasis added.) Video cameras and video tapes are not included in that list.

In the warrant application, a police officer swore that the facts establishing probably cause were contained in his attached affidavit, which provided in pertinent part as follows:

> On or about 8/18/95, a confidential informant advised that Felix Fogg was selling crack cocaine. The informant stated that Fogg kept records of conspirators and a gun ... Felix Fogg advised the affiant that Felix Fogg had recorder detection devices located on his phone ... The affiant is familiar with the methods of operation utilized by illegal drug dealers. ... The affiant has personal knowledge that illegal drug dealers often keep records of illegal transactions, money from illegal transactions, paraphernalia for the

> consumption and manufacturing of illegal drugs (packaging and repackaging), names of possible co-conspirators, counter surveillance equipment, and other equipment used in aiding a violation of the North Carolina Controlled Substance Act at their residence.

(Emphasis added.)

That probably cause affidavit does not mention photos, video tapes or video cameras. Based upon the record of trial, no other probable cause information was presented to the magistrate.

The appellant renews his argument made at trial that the video camera and video tapes were seized unlawfully and that they should have been excluded from his trial because the police never requested permission to seize those items in the warrant application, the probable cause affidavit does not mention those items, and the warrant itself does not expressly authorize seizure of that evidence. The appellant also concludes that all evidence derived from the alleged unlawful seizures should have been suppressed by the trial judge.

The Government counters that the magistrate expressly authorized the seizure of "photos" and video tapes are reasonably included in that term. However, assuming *arguendo*, that the word "photos" does encompass video tapes, there is nothing in the warrant application (including the attached probable cause affidavit) establishing probable cause for the seizure of "photos." There is a complete absence of any facts presented to the magistrate to establish that "photos" constituted evidence of the appellant's home. The Government suggests that the term "counter surveillance equipment" used in the probable cause affidavit includes "photos." However, there is no indication that such a factual proposition was ever presented to the magistrate.

The net effect of all this is that the warrant did not authorize seizure of video cameras or video tapes. However, this does not necessarily mean that the military judge erred by admitting those items and the evidence derived from the seizure of those items.

There are exceptions to the general exclusionary rule applicable to evidence seized without the benefit of a valid warrant. To narrow the scope of our review of the issue, we conclude that the evidence in question was not admissible under any theory of exigent circumstances or inevitable discovery. We do conclude that the disputed evidence was admissible under the good-faith exception to the general exclusionary rule. *See* MIL. R. EVID. 311 (b) (3); *United States v. Leon,* 468 U.S. 897, 922 (1984).

The basis for this so-called good-faith exception to the rule of exclusion is the recognition that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id.* at 916. Accordingly, "[i]n the absence of an allegation that the magistrate abandoned his [or her] detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926. *See also United States v. Maxwell*, 45 M.J. 406, 421 (1996).

In the appellant's case, the police officers who collaborated to construct the warrant application and supporting probable cause affidavit clearly believed that they obtained a warrant that would permit them to seize video cameras and video tapes. Their testimony, along with their reference to "counter-surveillance equipment" in the affidavit, demonstrates that they were concerned that the appellant had obtained the visual image of the undercover detective. The police also believed that the appellant used

video equipment to monitor his drug deals, and that these items constituted counter-surveillance equipment. Moreover, the police were obviously rushed to complete the warrant application before the appellant moved or destroyed evidence. It is abundantly clear that they simply forgot to expressly list video cameras and video tapes on the warrant application as items sought and that they simply forgot to address the appellant's possible use of "photos" in the probable cause affidavit. There was no deliberate Fourth Amendment violation. We conclude that the police officers were neither dishonest nor reckless in preparing the warrant application. We also find that the undercover officer who seized the video camera and tapes had an objectively reasonable belief that he was permitted to do so by the warrant. Under the circumstances of this case, suppression of the evidence in question because of a technical error on the part of the state magistrate would not further the purpose of the exclusionary rule, which is to deter police misconduct.

We conclude that the military judge did not err by denying the appellant's suppression motion. Assignment of Error I is therefore without merit.

Accordingly, we affirm the guilty findings approved below. We affirm only so much of the approved sentence as consists of a dishonorable discharge, reduction to pay grade E-1, and confinement for 30 years.

WILLIAM J. LUCAS

Judges OLIVER and LEO concur.

JOHN T. OLIVER
CONCURS/ABSENT FOR
SIGNATURE